85-2110 (1)

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WALTER KELLY, Superintendent of Attica Correctional Facility, ELIZABETH HOLTZMAN, District Attorney, Kings County, and ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

—v.—

CHESTER MATUSIAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 18, 1986

QUESTIONS PRESENTED

1. Whether the Constitution establishes a more stringent standard of mental competency to plead guilty than to proceed to trial, thereby creating a class of defendants who are competent to stand trial but not to forego a trial and plead guilty.

2. Whether defendant exhausted in state court his claim that the standard of competency to plead guilty is more stringent than the standard of competency to stand trial, a claim he never raised in the state courts, merely by challenging his competency to plead guilty and the voluntariness of the plea and by citing two federal cases for unrelated propositions.

3. Whether the Second Circuit erred by not deferring to well-supported state court findings of fact that defendant was competent to plead guilty to murder and that his plea was voluntary.

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—v.—

CHESTER MATUSIAK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Walter Kelly, Elizabeth Holtzman, and Robert Abrams[1] respectfully request that a writ of certiorari issue to review that judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 20, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, is reported at 786 F.2d 536 (2d Cir. 1986), and appears in the Appendix to this petition. The opinion of the United States District Court for the Eastern District of New

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1 By agreement with the Office of the Attorney General of the State of New York, Kings County District Attorney Elizabeth Holtzman represents both state respondents, as well as herself, in this federal *habeas corpus* proceeding challenging a Kings County criminal prosecution.

York, dated June 25, 1985, is not reported but appears in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 20, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

28 U.S.C. § 2254 (1977):

> (d) In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by the State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or any officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> > (1) that the merits of the factual dispute were not resolved in the State court hearing;
> >
> > (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> >
> > (3) that the material facts were not adequately developed at the State court hearing;
> >
> > (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

State Court Proceedings

Chester Matusiak was convicted of murder on a plea of guilty for suffocating 60-year-old Edward Mascia with a pillow in his Brooklyn apartment, on the night between June 12 and 13 of 1979. He had entered Mascia's apartment with an accomplice by climbing through a kitchen window, and stole property from the apartment.

For these acts, defendant was originally indicted for three counts of second-degree murder (intentional murder, felony-murder based on a robbery, and felony-murder based on a burglary), one count of first-degree robbery, and one count of first-degree burglary.[2]

Psychiatric Examinations Concerning Defendant's Competency to Proceed

Between his arrest on June 19, 1979, and his guilty plea on October 6, 1980, defendant was examined on several occasions in accordance with N.Y. Crim. Proc. Law Article 730 (McKinney 1984), to determine whether he was mentally competent to proceed. On his initial arraignment, the court issued an order for a psychiatric examination. Pursuant to that order, one psychiatrist (Dr. Adolph Goldman) and one psychologist (Dr. James Wulach) examined him in July and August of 1979, found him fit to proceed, and presented their findings to the court.

On November 1, 1979, at defendant's request the court issued another order of examination. This time defendant was examined by three psychiatrists. Dr. Ruth Finch concluded that defendant was fit to proceed and should be returned to court, but Drs. Richard Weidenbacher and Adolph Goldman found

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2 The co-defendant, Richard Dyser, pleaded guilty to Manslaughter in the First Degree and, on November 14, 1980, was sentenced, pursuant to a plea agreement, to an indeterminate term of imprisonment of four to twelve years.

that he was now unfit to proceed. Because the psychiatrists were not unanimous, the court conducted a hearing, as required by N.Y. Crim. Proc. Law § 730.30(4) (McKinney 1984), to determine whether defendant was fit to proceed.

At the hearing, held on November 21, 1979, the two psychiatrists who had reported defendant unfit were unable to justify their findings satisfactorily.[3] Dr. Weidenbacher explained that his finding of unfitness stemmed from his fear that defendant, who had a history of suicide attempts, might again attempt suicide because of the anxiety produced by a trial. He found, however, that defendant's statements had been relevant, that he understood the charges against him, and that he was capable of cooperating with defense counsel.

Dr. Goldman similarly conceded that his finding of unfitness was premised on his concern that defendant might attempt suicide. He added that he found that defendant's difficulty dealing with anxiety, which manifested itself in repeated attempts to get up and leave the interview, might prevent him from cooperating with defense counsel, but admitted that in fact he was able to persuade defendant to sit back down and to continue to answer questions. Turning to the accepted criteria of competency, Dr. Goldman acknowledged that defendant was able to discuss the charge "with considerable detail," and that he remembered being given his *Miranda* warnings and subsequently being questioned by police. Goldman also acknowledged that defendant understood the charges against him.

On the basis of the psychiatric evidence, and the testimony of defendant and his attorney, the hearing court found defendant fit to proceed. It found that defendant understood the nature of the charges against him, and would be able to discuss his case with counsel, as evidenced by Dr. Goldman's testimony that defendant could be persuaded to continue a conversation which he had abruptly terminated.

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3 Dr. Ruth Finch's report of her examination of defendant, which found him fit to proceed, was stipulated into evidence at the hearing. She did not testify.

The Guilty Plea and Allocution

On October 6, 1980, defendant, on the eve of trial, pleaded guilty to one count of Murder in the Second Degree (felony-murder based on a burglary) and received the statutory minimum sentence of fifteen years to life imprisonment. Defendant was represented by the same lawyer who had represented him at the competency hearing. Defendant's lawyer neither requested a new competency hearing nor claimed that the previous competency determination was no longer valid.

Before the allocution, defendant's attorney informed the court that he had had several discussions with defendant and that defendant had been examined by a psychiatrist who had concluded that at the time of the crime defendant did not know the nature and consequences of his acts. The attorney said he had told defendant of his possible insanity defense. The court informed defendant that he did not have to plead guilty and that the court would "do whatever you want done." Defendant acknowledged that he understood that he did not have to plead guilty and stated that he wanted to do so.

The court told defendant that he could raise an insanity defense at trial and that the jury would decide whether the defense was valid. Defendant first said that he would take the case to trial. After conferring with his attorney, however, he reaffirmed his desire to plead guilty and, upon the court's inquiry, said he realized he was foregoing an insanity defense. He also acknowledged that he understood that by pleading guilty he was waiving his right to a jury trial, his right to confront the People's witnesses, and his right to present doctors and other witnesses in his behalf.

The court then elicited from defendant a factual recitation of the crime. Defendant admitted that he entered the victim's apartment through an open window and that he had killed the victim by suffocating him with a pillow. Defendant stated that he had done so out of fear that his victim would recognize him.

Several times during the plea proceedings defendant took time to consult with counsel. Defendant's attorney at no time complained that defendant was having trouble understanding the court's inquiry. The court accepted defendant's plea.

State Appeals

Defendant appealed his conviction to the New York Supreme Court, Appellate Division, Second Department, a court with factfinding power, N.Y. Crim. Proc. Law § 470.15(1) (McKinney 1983). The Appellate Division rejected without opinion defendant's claims that he was denied due process when the hearing court found him fit to proceed, and that the trial court extracted his plea when he was incapable of waiving his right to trial. *People v. Matusiak*, 98 A.D.2d 997, 470 N.Y.S.2d 264 (2d Dep't 1983). Leave to appeal to the Court of Appeals was denied. *People v. Matusiak*, 61 N.Y.2d 910, 474 N.Y.S.2d 1033 (1984).

Federal Court Proceedings

On January 2, 1985, defendant filed a petition for a writ of *habeas corpus* with the United States District Court for the Eastern District of New York. Defendant claimed that the state trial court erroneously determined that he was fit to proceed, and also claimed that he was denied due process when the trial court accepted his guilty plea because he was incapable of waiving his right to trial. By order dated June 25, 1985, the District Court dismissed the petition (Sifton, J.). The District Court determined that defendant had received a full and fair hearing in state court on the issue of fitness to proceed, and that the state court's factual determination of fitness was "amply supported by the record" and was therefore entitled to the presumption of correctness, 28 U.S.C. § 2254(d). Further, the District Court found that the "record in this case discloses that [defendant] knowingly and voluntarily entered his plea of guilty."

On appeal to the United States Court of Appeals for the Second Circuit, defendant renewed the two claims he had

asserted in state court and in the District Court. He made the additional argument that his plea was not voluntary because competency to plead guilty should be measured by a standard more stringent than that required for competency to stand trial, and he was not competent under that higher standard.

The Court of Appeals reversed the judgment of the District Court, and by order dated March 20, 1986, directed that court to issue an order conditionally granting the writ unless within thirty days the state holds a hearing to determine defendant's present mental competency to stand trial or to enter a plea of guilty (Kearse, J., joined by Oakes and Pierce, JJ.). The court held that a more stringent standard of competency is required for entering a guilty plea than for standing trial, and that defendant was not competent to plead guilty under that more stringent standard. The court held that defendant had implicitly exhausted in state court his claim that a more stringent standard of competency is required for entering a guilty plea, merely by raising the questions of competency and voluntariness of the guilty plea, and citing for unrelated propositions two federal cases that mention varying standards of competency. This petition for certiorari challenges both those legal determinations.

Defendant is currently incarcerated pursuant to the state court judgment. The Court of Appeals stayed its mandate only until May 27, 1986, without prejudice to the state's right to seek a stay from the United States Supreme Court. On June 12, 1986, the District Court entered an order pursuant to the mandate providing that the writ will be granted unless the state holds a hearing within thirty days (*i.e.*, by July 12) to determine defendant's present mental competency to stand trial or to enter a guilty plea. On June 13, 1986, petitioners served and filed an application for a stay addressed to a Justice of this Court. That application is pending.

Reasons for Granting the Writ

I. The Decision Below Conflicts With The Decisions Of Eight Other Federal Courts Of Appeals, And Of The New York State Court Of Appeals, In Holding That The Standard Of Competency To Plead Guilty Is More Stringent Than The Standard Of Competency To Proceed To Trial.

The Court of Appeals for the Second Circuit has decided that defendant's plea of guilty was not voluntary because he did not meet a standard of competency to plead guilty more stringent than that required for competency to stand trial.[4] The Second Circuit has thus joined two other circuits in abandoning the traditional rule, accepted by eight other circuits and by the New York State courts, that the standard of competency to stand trial measures an accused's competency to participate in all criminal proceedings.

This Court in *Dusky v. United States*, 362 U.S. 402, 402 (1960) held that the test for competency to stand trial is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of understanding—

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4 It is clear for several reasons that the Second Circuit has in fact adopted this new and more stringent standard of competency for guilty pleas. First, the court went to great lengths to hold that defendant had satisfied the exhaustion requirement with respect to the claim that a more stringent standard is required for guilty pleas. 786 F.2d at 541-43. This holding, which petitioners strenuously challenge, would have been unnecessary if the new and more stringent standard were not the basis for decision. Second, the court found defendant incompetent to plead guilty while expressly reserving the question of his competency to stand trial, 786 F.2d at 541, thus holding that the standards are different. Finally, while the court attempted to characterize its holding at least in part as a determination of the voluntariness of the plea rather than of defendant's competency to plead guilty, it also held expressly that the record failed to support a determination that he was competent to enter the plea, 786 F.2d at 544. Moreover, its determination of involuntariness rests not on any facts relating to this particular plea but rather on defendant's general mental condition and its bearing on his competency to enter a voluntary plea of guilty.

and whether he has a rational as well as factual understanding of the proceedings against him." Eight circuits have expressly held that that standard of mental competency for trial also measures competency to plead guilty. *See Allard v. Helgemoe*, 572 F.2d 1, 3-5 (1st Cir.), *cert. denied*, 439 U.S. 858 (1978); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339, 342 n.2 (3d Cir. 1975); *Bolius v. Wainwright*, 597 F.2d 986, 988 n.3 (5th Cir. 1979); *Williams v. Bordenkircher*, 696 F.2d 464, 466 (6th Cir.), *cert. denied*, 461 U.S. 916 (1983); *United States ex rel. Heral v. Franzen*, 667 F.2d 633, 637-38 (7th Cir. 1981); *White Hawk v. Solem*, 693 F.2d 825, 829-30 n.7 (8th Cir. 1982), *cert. denied*, 460 U.S. 1054 (1983); *Wolf v. United States*, 430 F.2d 443, 444 (10th Cir. 1970); *Stinson v. Wainwright*, 710 F.2d 743, 745 (11th Cir.), *cert. denied*, 464 U.S. 984 (1983). New York has also recognized this standard as the settled rule for determining competency both for trial and for pleading guilty. N.Y. Crim. Proc. Law § 730.10(1) (McKinney 1984);[5] *People v. Reason*, 37 N.Y.2d 351, 353-54, 372 N.Y.S.2d 614 (1975); *People v. Sharpe*, 72 A.D.2d 572, 420 N.Y.S.2d 736 (2d Dep't 1979).

The Second Circuit, by contrast, has adopted a rule that creates a class of defendants who are competent to proceed to trial but not competent to plead guilty. These defendants are thus forced to trial and prohibited from obtaining the benefits of a guilty plea, such as an expedited disposition and a reduced sentence. This rule has no support in logic or in policy.

The approach to competency taken by the Second Circuit in this case was first announced by the Ninth Circuit in *Sieling v. Eyman*, 478 F.2d 211, 214-15 (9th Cir. 1973), and subsequently followed by the District of Columbia Circuit in *United States v. Masthers*, 539 F.2d 721, 726 n.30 (D.C. Cir. 1976). These

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5 Under New York law, a defendant is an incapacitated person, against whom the criminal action may not proceed either by plea or by trial, if "as a result of mental disease or defect [defendant] lacks capacity to understand the proceedings against him or to assist in his own defense." N.Y. Crim. Proc. Law § 730.10(1); *see generally* N.Y. Crim. Proc. Law Article 730.

courts were laboring under the mistaken belief that the result was compelled by this Court's holding in *Westbrook v. Arizona*, 384 U.S. 150 (1966), but that is simply incorrect. In *Westbrook*, this Court held that a finding of competency to stand trial did not necessarily determine whether a defendant was competent to waive the assistance of counsel and conduct his own defense. That holding rests on the unique nature of the right to the assistance of counsel, a right which makes possible the intelligent exercise or waiver of all other rights. It does not stand for the general proposition, asserted in *Sieling*, *Masthers*, and the instant case, that the standard for waiving any constitutional right is higher than the standard for exercising that right intelligently. Indeed such a result would be absurd.

First, as a matter of logic, a defendant who is competent to exercise the right to trial must also be competent to decide not to exercise it. The two decisions are simply opposite sides of the same coin. Implicit in the decision to proceed to trial is the decision not to plead guilty. Therefore, as a matter of law, a person who is competent to decide to go to trial must be competent to decide whether or not to plead guilty.

Indeed, proceeding to trial requires, if anything, more numerous and more refined decisions than pleading guilty. A defendant who proceeds to trial must decide whether to exercise or to waive the fundamental right to testify or be silent, and the fundamental right to jury trial, as well as a myriad of other, strategic, trial-related rights. Some of these decisions may well be as important as the decision to plead guilty in affecting defendant's fate. This Court has recognized that fact by noting that, like the decision of what plea to enter, the decision to waive or exercise the right to testify and the decision to waive or exercise the right to jury trial must be made by the defendant personally, and cannot be delegated to defense counsel. *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983); *see* ABA Standards for Criminal Justice, The Defense Function, Standards 4-5.2, 4-8.2, 4-8.3 (2d ed. 1980); Model Code of Professional Responsibility EC7-7 (1979).

If competent to waive the right to testify, and the right to be silent, and the right to jury trial, a defendant must also be competent to waive the right to trial by pleading guilty. The decisions are similar in their fundamental character and consequences, and require similar abilities. This Court's decision in *Westbrook* to give special scrutiny to the decision to waive counsel and proceed to trial *pro se* should not be interpreted as opening the Pandora's box of establishing separate standards of competency for each of the decisions that must be made in the course of a criminal proceeding.

The Second Circuit's rule is flawed not only as a matter of logic, but also as a matter of sound judicial administration. Under that rule, some defendants who are competent for trial, but have made a reasonable judgment that the risks of trial are unacceptable, will be barred from acting on that assessment of risk and instead forced to trial. For example, in the instant case, defendant, represented by competent counsel, may well have determined that the evidence against him made a murder conviction a certainty, and for that reason decided to plead guilty to assure himself of the most lenient sentence possible for that crime.[6] The Second Circuit's rule would prevent him from making that judgment, and would force him to trial where he would face the risk of a much more substantial sentence. No sensible purpose can be served by a rule which seeks to "protect" only those defendants who rationally decide to minimize the risks they face.

Moreover, under the Second Circuit's rule it would be imprudent for the state to accept a plea from any defendant

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6 The People's file and the trial court's file show that when defendant pleaded guilty, the People's evidence was extremely strong, including statements made by defendant to law enforcement officials and to others. As a result of defendant's plea, he received the statutory minimum sentence for murder of fifteen years to life, and avoided the probability of receiving a substantially greater sentence. If he had been convicted after trial, he would have faced a possible sentence of twenty-five years to life for the murder, and consecutive terms of eight and one-third to twenty-five years each for the robbery and the burglary.

with any psychiatric history whatever, in order to protect against the possibility that many years later the plea may be set aside and the state forced to try an indictment that has grown stale with the passage of time. Indeed, in the instant case, the decision below permits defendant, who obtained the benefit of the original bargain, to set aside his murder conviction many years later and to benefit from the deterioration of evidence that inevitably has occurred.

The circuits are divided on the standard of competency to plead guilty, and there is now also a conflict between the state and federal courts in New York. It is essential to resolve the conflict in order to permit the orderly conduct of plea negotiations in New York and the rest of the country. This court should grant the writ of certiorari to review the judgment below and resolve the conflict.

II. The Decision Below Nullifies The Exhaustion Requirement Of The Federal Habeas Corpus Statutes By Finding Exhaustion In A General Challenge To Competency To Plead And The Voluntariness Of The Plea, And In The Bare Citation Of Two Cases, Although Defendant Never Claimed In State Court That A Defendant Who Pleads Guilty Must Satisfy A More Stringent Standard Of Competency Than A Defendant Who Stands Trial.

Defendant argued for the first time in the Second Circuit that "[a] higher standard of competence is required for entering a guilty plea than for standing trial" (Defendant's brief to the Second Circuit at 18), and the Second Circuit adopted that view. He had never made that argument to the state courts. In his state appeal, defendant argued merely that the hearing courts' findings, of competency to proceed and voluntariness of the plea, were not supported by the evidence and that his guilty plea did not constitute a knowing waiver of his constitutional right to a trial (Defendant's state appellate brief at 21-31, reproduced in the Appendix to his Reply Brief in the Second Circuit). He never challenged New York's unitary standard of competency, or argued that the Constitution re-

quired different standards for competency to stand trial and competency to plead guilty.

Nevertheless, the Second Circuit strained to find exhaustion on two grounds. First, it held that the claim was exhausted by the mere attack on the knowing and voluntary character of the plea, and the general challenge to defendant's competency to plead guilty. But those claims in no way alerted the state courts to defendant's claim that competency to plead guilty should be measured by a more stringent standard than competency for trial. This novel claim, which squarely challenges New York law on the point, cannot fairly be seen as included in the two claims that were presented to the state courts.

Second, the court below found exhaustion in the fact that defendant cited *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978) and *Westbrook v. Arizona*, 384 U.S. 150 (1966) in his state appellate brief. 786 F.2d at 542. Defendant cited neither case, however, for the proposition that a guilty plea requires a more stringent standard of competency than does a trial, nor could the state courts have reasonably understood him to be making that claim. He cited *Suggs* for the simple proposition that in the case of a mentally incompetent defendant due process prohibits not only a trial but also the acceptance of a guilty plea (Defendant's state appellate brief at 26). That citation, merely applying to guilty pleas the principle established for trials by *Pate v. Robinson*, 383 U.S. 375 (1966), appears to stand for the proposition that the constitutional standard of competency to plead guilty is indentical to the standard of competency for trial. It can hardly have alerted the state courts to the claim that a guilty plea requires a more stringent standard of competency than does a trial. That claim, advanced by defendant for the first time in the Second Circuit and adopted by that court, was never fairly presented to the state courts or considered by them.

The Second Circuit somewhat disingenuously attempted to support its finding of exhaustion by observing that *Suggs* had mentioned in a footnote the more stringent standard of compe-

tency for guilty pleas adopted by the Ninth Circuit in *Sieling*. 786 F.2d at 542. That theory stretches the concept of exhaustion past the breaking point. Defendant never mentioned in the state courts either that footnote, or the proposition contained in it. It strains credulity to suppose that the state courts were made aware by a simple citation to *Suggs* that defendant was urging them to adopt a Ninth Circuit rule that is mentioned, but not adopted, in footnote 65 of the 28-page opinion in that case.

The citation to *Westbrook* is similarly unhelpful to defendant's claim of exhaustion. Defendant cited *Westbrook* for the proposition that the plea court was obliged to make an especially searching inquiry into each of the rights defendant was waiving by his plea (Defendant's state appellate brief at 29). That claim, which petitioners dispute (*see* pp. 15-17, *supra*), is quite different from the claim that a defendant who is competent for trial may nevertheless be incompetent to enter a guilty plea, on the theory that the Constitution establishes different standards of competency for plea and for trial.

In *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (*en banc*), the Second Circuit set forth criteria for exhaustion which carry the potential for undermining the whole purpose of the exhaustion doctrine. In this case that potential has been realized. The *Daye* court held, *inter alia*, that a defendant may fairly present a constitutional claim to the state courts "even without citing chapter and verse of the constitution" by citing pertinent federal cases employing constitutional analysis. 696 F.2d at 194. In the instant case, the Second Circuit held that requirement was satisfied by the citation of two federal cases in the state appellate court, for propositions distinct from and even contrary to the proposition now at issue, and without any reference in state court to the footnote (in *Suggs*) or the argument by analogy (from *Westbrook*) that might lend support to the claim now sought to be raised in federal court. That holding makes exhaustion a game. It encourages defendants to proliferate citations in state court, in the hope that if a new

claim is discovered in the course of federal *habeas corpus* proceedings some footnote in a case cited in state court will suffice to satisfy the requirement of exhaustion. The holding completely ignores the fundamental purpose of the exhaustion doctrine, which is to limit federal intervention into state criminal convictions to those cases where the state courts have failed to provide adequate protection to federal constitutional rights. This is not such a case.

This Court should grant the writ of certiorari to protect the integrity of the exhaustion doctrine from the serious erosion now occurring in the United States Court of Appeals for the Second Circuit.

III. The Decision Below Overturns A State Murder Conviction By Disregarding Well-Supported State Court Findings Of Fact, And Thereby Jeopardizes Important Principles Of Federalism And The Finality Of Judgments.

The Second Circuit set aside defendant's 1980 state murder conviction on the basis of its own finding that he was not at that time mentally competent to enter a guilty plea. In reaching that conclusion, the court disregarded the contrary factual findings of two state courts and the federal district court, in violation of 28 U.S.C. § 2254(d) and the principles set forth in *Sumner v. Mata*, 455 U.S. 591 (1982).

The analysis below flies squarely in the face of this Court's holding in *Maggio v. Fulford*, 462 U.S. 111 (1983), that mental competency is a question of fact for which the state court's determination is entitled to special deference. Moreover, *Maggio* cannot be avoided by characterizing the ruling below as a ruling on the voluntariness of a plea. First, the court below expressly grounded its determination on a finding of incompetency to plead guilty, bringing the case squarely within the rule of *Maggio*. Second, even a finding of involuntariness, while a mixed question of law and fact, requires federal deference to state court factfinding for the questions of historical fact

underlying the determination. *Marshall v. Lonberger*, 459 U.S. 422 (1983).

The court below recognized this obstacle to its analysis, and responded by minimizing the state court's finding of competency as "implicit," and by asserting that the record does not support the state court factual determination. 786 F.2d at 544. Neither response is adequate.

There can be no doubt that the state court that took the plea affirmatively found defendant competent to proceed. The court and both counsel were well aware of defendant's history on this issue, and had already demonstrated their willingness to reopen the question of competency if appropriate. The failure to do so can only be construed as a finding of continuing competency to proceed. That the final determination was implicit, unlike the several prior explicit determinations, does not take it outside the rule that state court findings are entitled to deference in a *habeas corpus* proceeding. *Marshall v. Lonberger*, 459 U.S. at 433-34.

Moreover, the state Appellate Division made its own determination of competency, when defendant challenged the finding in his state appeal. The Appellate Division has factfinding power, N.Y. Crim. Proc. Law § 470.15(1), and thus its rejection of defendant's claim constitutes a second state factual determination of competency, entitled to deference in the federal courts. *Sumner v. Mata (I)*, 449 U.S. 539, 547-48 (1981); *Sumner v. Mata (II)*, 455 U.S. at 592-93.

The Second Circuit asserted that the record fails to support these findings, but that assertion requires a reinterpretation of the evidence, and the inferences fairly drawn from it, that is wholly inconsistent with the principle of deference set forth in 28 U.S.C. § 2254(d).

The Second Circuit emphasized several factors in its analysis of the record, but each is subject to conflicting interpretations and the state courts' interpretation should control. First, the Second Circuit speculated that defendant may have been mis-

led into abandoning a triable insanity defense, because he may not have known that insanity could lead to an acquittal or because he may have thought the judge would overrule any jury finding of insanity. 786 F.2d at 544. But the judge had expressly told defendant that notwithstanding his own doubts about the insanity defense, defendant might have better luck with a jury. Moreover, defense counsel stated at the plea proceeding that he had discussed with defendant the possible insanity defense and the significance of a guilty plea. On that record, the state courts were entitled to conclude that defendant was capable of understanding, and did understand, the significance of his plea in relation to any possible insanity defense. The Second Circuit's contrary view amounts to unwarranted interference with a state court factual determination, based on nothing more than a speculative reading of a cold record.

Second, the Second Circuit inferred from defendant's prior psychiatric history, and the passage of ten months since the last psychiatric evaluation, that the record could not sufficiently support a determination of present competency to plead guilty. But defense counsel, who had represented defendant effectively and vigorously throughout the prior competency proceedings, did not at the time of the plea request a new evaluation of defendant's competency. Moreover, the court had before it all the psychiatric reports as well as their conclusions, and could well have adopted the view of the prior hearing judge that even those psychiatrists who had previously questioned defendant's competency were basing their conclusions on inappropriate criteria. The decision of the plea court to rest on the record before it is amply supported, and the Second Circuit's contrary view again rests on speculation, or in any event on a foundation too weak to justify overturning the state court factual determination.

Finally, the Second Circuit inferred incompetency from defendant's reluctance to admit to particular facts that established his guilt of the crime. His equivocations, and his

frequent consultations with counsel, set forth at length in the opinion below, are taken as evidence of mental incompetency. But the state plea court, which observed both defendant and his counsel throughout these proceedings, was entitled to reach a contrary conclusion.

Defendant's reluctance to admit the factual details of his guilt is not uncommon. It frequently evidences not mental incompetency but rather a rational mind attempting to obtain the benefits of a plea without the burden of admitting guilt, not unlike the plea of *nolo contendere* frequently entered by corporations, those most rational of criminal defendants. Similarly, defendant's frequent consultations with counsel suggest not an incompetent defendant, but rather one who at every turn sought and received explanations and advice about how to proceed.

The Second Circuit's interpretation of the behavior of defendant and his counsel depends on the speculation that counsel was giving ineffective and inappropriate advice. That speculation is utterly unsupported in this case, where counsel was a thorough and vigorous advocate for defendant, and it is contrary to this Court's presumption of competent counsel, *see United States v. Cronic*, 466 U.S. 648, ____, 104 S. Ct. 2039, 2046 (1984) (defense counsel is presumed to be "competent to provide the guiding hand that defendant needs"); *Marshall v. Lonberger*, 459 U.S. at 436-38 (an attorney can be presumed to have discussed with his client the elements of the crimes to which the client pleaded guilty). The state courts' interpretation of this record, based on the first-hand observations of defendant and his counsel, is entitled to deference here.

This Court should therefore grant the writ of certiorari in order to enforce the statutory requirement of federal deference to state court factual findings which are supported by the record.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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June 18, 1986

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 597—August Term, 1985

(Argued: December 16, 1985 Decided: March 20, 1986)

Docket No. 85-2233

CHESTER MATUSIAK,

Petitioner-Appellant,

—v.—

WALTER KELLY, Superintendent of Attica Correctional Facility, ELIZABETH HOLTZMAN, District Attorney Kings County, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents-Appellees.

Before:

OAKES, KEARSE, and PIERCE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, denying petitioner's application, pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus.

Reversed and remanded.

PHYLIS SKLOOT BAMBERGER, Federal Defender Services Unit, The Legal Aid Society, New York, New York, *for Petitioner-Appellant*.

DARRELL FIELDS, Assistant District Attorney, Kings County, Brooklyn, New York (Elizabeth Holtzman, District Attorney, Kings County, Barbara D. Underwood, Assistant District Attorney, Kings County, Brooklyn, New York, on the brief), *for Respondents-Appellees*.

KEARSE, *Circuit Judge*:

Petitioner Chester Matusiak, a New York State prisoner who pleaded guilty to second-degree murder, in violation of N.Y. Penal Law § 125.25(1) (McKinney 1975), appeals from a judgment of the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge*, denying his petition, pursuant to 28 U.S.C. § 2254 (1982), for a writ of habeas corpus. Matusiak contends

that the district court erred in rejecting his claim that his plea of guilty should be set aside on due process grounds because the state court (a) erroneously found him competent to stand trial and (b) accepted his plea of guilty although he was not capable of knowingly and voluntarily entering such a plea. Respondents (the "State") contend that dismissal of the petition is required because Matusiak has not exhausted his state court remedies with respect to the latter claim and that, in any event, the petition lacks merit. Finding that all of Matusiak's present claims were adequately presented to the state courts, and finding merit in the claim that his guilty plea was not entered knowingly and voluntarily, we reverse the judgment of the district court and remand for entry of an order conditionally granting the writ.

I. BACKGROUND

In June 1979, Matusiak, then 20 years old, was arrested and charged with having acted in concert with Richard Dyser to cause the death of Edward Mascia. Shortly after his arrest, Matusiak, who had been institutionalized in at least five different psychiatric hospitals since the age of 11, was placed on a suicide watch. Upon his initial arraignment in Criminal Court, the court ordered a psychiatric examination pursuant to N.Y. Crim. Proc. Law § 730 to determine whether he was fit to proceed to trial. A qualified psychiatrist and a certified psychologist examined Matusiak, and both found him fit to proceed. In the meantime, Matusiak was indicted on three counts of second-degree murder, one count of first-degree robbery, and one count of first-degree burglary. On July 13, 1979, upon his postindictment arraignment in New York

Supreme Court, Matusiak entered a plea of not guilty to all of the offenses charged.

A. *The 1979 Competency Proceedings in State Supreme Court*

In late October 1979, because of his delusional and other aberrant behavior, Matusiak was transferred from the prison where he was being detained to the Kings County Hospital Center ("Hospital Center") in Brooklyn. On November 1, 1979, at Matusiak's request, Supreme Court Justice John R. Starkey, ordered another psychiatric examination pursuant to § 730. Two Hospital Center psychiatrists, including one of the examiners who had found him fit to proceed in July 1979, examined Matusiak and found him not fit to proceed. Another psychiatrist examined him and found him fit to proceed.

On November 21, 1979, a competency hearing was conducted before Justice Philip E. Lagana at the Hospital Center. At the hearing, Matusiak's attorney and both of the psychiatrists who had found Matusiak unfit to proceed testified to his incompetence to stand trial. The record included the reports of these two psychiatrists and the report of the psychiatrist who had found Matusiak fit to proceed in early November. Matusiak himself also testified. The court concluded that Matusiak was fit to proceed.

B. *The 1980 Plea of Guilty*

On October 6, 1980, nearly one year after Matusiak had last been adjudged competent to proceed to trial, he pleaded guilty to one count of second-degree murder, in a proceeding before Justice William C. Thompson. In the course of the plea hearing, the court advised Matusiak

that he had an absolute constitutional right to a jury trial and that he could bring in witnesses, including doctors, and could cross-examine the prosecution's witnesses. When asked if he understood that by pleading guilty he would give up his constitutional right to have a trial by jury, Matusiak responded, "Yes." Nonetheless, the colloquy that surrounded this response and led to the acceptance of the plea of guilty was tortuous.

Matusiak's attorney advised the court that Matusiak wished to withdraw his prior plea of not guilty and to enter a plea of guilty to second-degree murder notwithstanding the availability of a defense of insanity. Counsel stated that he had intended to present this defense through Matusiak's psychiatric record and the opinion of a court-appointed psychiatrist who had examined Matusiak and concluded that Matusiak had not known the nature and consequence of what he was doing or that what he was doing was wrong. When asked by the court if he wanted to plead guilty, Matusiak stated that he did but that 15 years was a long time. The court told Matusiak that he could go to trial and added that the court would do whatever he wanted. Matusiak replied that he was "positive" that he wanted to plead guilty. Immediately thereafter, however, when the court sought to be sure that Matusiak genuinely wished to waive his defense of insanity, Matusiak responded that he wanted to go to trial:

> THE COURT: Okay. You know there is a possible defense, I believe Mr. Moser spoke to you, that you might have if you went to trial. It's up to the jury as to whether they're going to believe or not a defense of insanity. Do you know that?
>
> THE DEFENDANT: I'll take it to trial.

THE COURT: You'd rather take it to trial?

THE DEFENDANT: Yes.

THE COURT: Then you don't want to plead guilty then, right?

THE DEFENDANT: No.

(Transcript of hearing held October 6, 1980 ("Tr."), at 6.) But when the court then stated that Matusiak could have a trial, he promptly changed his mind again:

THE COURT: Okay. You'll go to trial, no problem. That's no problem.

(Whereupon, the defendant conferred with counsel.)

THE DEFENDANT: Your Honor, I don't want to go to trial. I want to plead guilty now.

THE COURT: You can't go both ways, Mr. Matusiak. You have to tell me now what you want me to do. What do you want me to do?

THE DEFENDANT: I'll cop out.

THE COURT: What?

THE DEFENDANT: Cop out.

THE COURT: You want to cop out? In other words, what you're going to do is plead guilty?

THE DEFENDANT: Yes.

THE COURT: Okay. And you realize once you plead guilty the insanity defense that you were going to use, you can't use anymore. You understand that?

THE DEFENDANT: (Nods head in the affirmative.)

THE COURT: What? Do you understand that?

THE DEFENDANT: Yes.

(Tr. 6-7).

When the court then sought to elicit from Matusiak a description of the events leading to the murder charge, the following colloquy ensued:

THE COURT: Now, Mr. Matusiak, what you're pleading guilty to is that on or about—between June 12 and June 13, you and Mr. Dyser killed somebody by the name of Edward Mascia. Is that true? Is that true?

(Whereupon, the defendant conferred with counsel.)

THE DEFENDANT: He didn't kill him.

THE COURT: I wan't [*sic*] there. I don't know what happened. Tell me what happened. Tell me what happened in your own words.

(Whereupon, the defendant conferred with counsel.)

THE DEFENDANT: I don't want to talk about it.

THE COURT: Oh, you have to talk about it. Tell me what happened. I wasn't there. I don't know. You tell me what happened. What happened during that night?

(Whereupon, the defendant conferred with defendant [*sic*].)

THE DEFENDANT: Well, we was in the room—

THE COURT: Who was in the room?

THE DEFENDANT: Me and myself.

THE COURT: Yes.

THE DEFENDANT: I was in the room, and I heard the guy was making noises.

THE COURT: What guy was making noise?

THE DEFENDANT: The guy that was—the guy that

was murdered.

THE COURT: How did you get in this room?

THE DEFENDANT: Through a window. The window was open.

THE COURT: Who opened the window?

THE DEFENDANT: It was opened already.

THE COURT: And what did you do, go in through the window?

THE DEFENDANT: Yes. Somebody robbed the place before we went in.

THE COURT: All right. Then when you went in, what did you do?

THE DEFENDANT: Nothing. I just went in a room, and the guy was making funny noise. And I said, "Let's go," and we left.

THE COURT: So, you didn't do anything, right?

(Whereupon, the defendant conferred with counsel.)

THE DEFENDANT: When I'm in the room, the guy was making noises, right, so when I seen the way he was making noise, I went to the kitchen and got some water, and tried to give him so [*sic*] water. But then it was too late. He started gargling. Then I went and got more water.

THE COURT: You were a good Samaritan? You were helping him? You wanted to give him water?

THE DEFENDANT: I gave him water because he couldn't hardly breathe.

THE COURT: How did he die?

THE DEFENDANT: I don't know.

THE COURT: You don't know?

(Whereupon, defendant conferred with counsel.)

THE DEFENDANT: They said by suffocation.

THE COURT: How do you know he suffocated?

THE DEFENDANT: Because when I went—when I was being questioned by officers—

THE COURT: Yes.

THE DEFENDANT: They said he had a pitcher on him with a pillow on his face.

THE COURT: I see. How did that pillow get there?

THE DEFENDANT: I don't know.

THE COURT: Did you have anything to do with putting that pillow over his face?

THE DEFENDANT: No.

THE COURT: You're sure now?

THE DEFENDANT: No.

THE COURT: You're absolutely positive you had nothing to do with the pillow going over his face? You're sure about that? How did that pillow get over his face, and how did he suffocate? You tell me.

(Whereupon, the defendant conferred with counsel.)

THE COURT: How did it get there?

THE DEFENDANT: I don't know who put it there.

THE COURT: You're sure you don't know?

THE DEFENDANT: Positive.

THE COURT: You're positive now?

THE DEFENDANT: (Nods head in the affirmative.)

THE COURT: I'm not going to keep asking you.

(Whereupon, the defendant conferred with counsel.)

THE DEFENDANT: I killed the guy.

THE COURT: I didn't hear you.

THE DEFENDANT: I murdered the guy.

THE COURT: How did you murder the guy?

THE DEFENDANT: When I put a pillow over his face.

THE COURT: Oh, you're the one that put the pillow over his face?

THE DEFENDANT: I tried to help him.

THE COURT: What?

THE DEFENDANT: I tried to help him later on.

THE COURT: What did you put the pillow over his face for?

THE DEFENDANT: I don't know.

THE COURT: What?

THE DEFENDANT: I don't know what I was doing.

THE COURT: You didn't know what you were doing?

THE DEFENDANT: I don't know.

THE COURT: If you're not sure, if you didn't know what you were doing, that sounds like a defense of insanity: "I didn't know what I was doing, and I did it." Now, which is it? Did you know what you were doing, or did you not know what you were doing?

THE DEFENDANT: I didn't know what I was doing.

THE COURT: If you did not know what you were doing, maybe a jury will believe what you will tell them. I don't believe you, and maybe a jury will believe you. Why don't you let the jury decide if you knew what you were doing. They'll make the decision for you better than I will.

(Whereupon the defendant conferred with counsel.)

THE COURT: I can't hear you. You're afraid of what?

THE DEFENDANT: That he will recognize me.

THE COURT: Oh, you put the pillow over his face because you were afraid he would recognize you; is that right?

(Whereupon, the defendant conferred with counsel.)

THE COURT: Is that what caused his death, that pillow over his face?

THE DEFENDANT: Yes.

THE COURT: You know, Mr. Matusiak, I've asked you a lot of questions, haven't I?

THE DEFENDANT: Yes.

THE COURT: Any questions you want to ask me?

THE DEFENDANT: How much time will I get for this? How much time?

THE COURT: How much time you're going to get?

THE DEFENDANT: Yes.

THE COURT: 15 years to life.

THE DEFENDANT: When will I be able to come out?

THE COURT: After 15 years.

THE DEFENDANT: After 15 years?

THE COURT: Yes. Why, you think that's unfair? What about the guy who's dead? How much time do you think he's got?

THE DEFENDANT: Never mind.

THE COURT: That's right, he doing a lot of time himself, isn't he? He's doing the rest of his natural life, because you killed him, didn't you? Didn't you?

THE DEFENDANT: Yes.

(Tr. 8-15.)

Finally, the court asked Matusiak who was with him when Mascia was killed, and Matusiak replied, "I was by myself." When the court insisted that Matusiak say who was with him, Matusiak stated, after conferring with counsel, "Dyser was with me. . . . But he wasn't there at the time." When the court asked whether Dyser had helped Matusiak to hold the pillow over Mascia's face, Matusiak replied, "I don't know." Eventually, after further questioning, Matusiak stated that he had done it by himself. The court then stated that the plea was acceptable.

Matusiak was eventually sentenced (Thompson, *J.*) to serve the statutory minimum for second-degree murder, 15 years to life imprisonment. He appealed the judgment of conviction to the Appellate Division, arguing that he had been denied due process by the lower court's finding that he was fit to proceed and by its acceptance of his guilty plea when he was mentally incapable of waiving his right to trial. The Appellate Division affirmed without opinion, 98 A.D.2d 997, 470 N.Y.S.2d 264 (2d Dep't 1983); leave to appeal to the New York Court of Appeals was denied, 61 N.Y.2d 910, 474 N.Y.S.2d 1033 (1984).

C. The Decision Below

Matusiak commenced the present action pro se, filing with the district court a petition for a writ of habeas corpus alleging that the state trial court had denied him due process by finding that he was competent to proceed to trial when in fact he was not, and by accepting his plea of guilty when in fact he was mentally incapable of knowingly and voluntarily entering such a plea. The district court rejected both contentions.

The court noted that under 28 U.S.C. § 2254(d)(8), the federal court in a habeas proceeding is generally required to presume the correctness of any finding of fact made by the state court unless, in light of the record as a whole, the federal court concludes that "such factual determination is not fairly supported by the record." The court found that the state court's November 1979 determination that Matusiak was competent to proceed was amply supported by the record. As to the contention that the plea of guilty should not have been accepted, the court found that "[a]lthough petitioner's plea was certainly not a model of clarity or consistency, the record does indicate that it was made voluntarily and knowingly." Memorandum and Order dated June 25, 1985, at 9. The court noted certain of Matusiak's equivocations during the plea proceeding and stated that

> [p]etitioner's expression of confusion when called upon to plead should perhaps have prompted a greater inquiry by the judge as to the source of petitioner's indecision, but no such inquiry was required. *See United States ex rel. Bullock v. Warden*, 408 F.2d 1326 (2d Cir. 1969) [, *cert. denied*, 396 U.S. 1043 (1970)]. Petitioner's answers to the judge's questions, on balance, indicate that he wished to plead guilty and understood the consequences of so doing.

Id. at 10. Accordingly, the court denied the writ.

D. *Issues on Appeal*

On this appeal, Matusiak pursues his contentions that he was denied due process by the state court's finding that he was competent to proceed to trial and by its acceptance

of his plea of guilty. The State, in addition to opposing the appeal on its merits, contends that Matusiak's claim relating to his plea of guilty was not fully exhausted in the state courts. For the reasons below, we reject the State's exhaustion argument. Since we find merit in Matusiak's contention that the acceptance of his plea of guilty constituted a denial of due process, we need not reach his contention that the state court's earlier finding that he was competent to proceed also denied him due process.

II. DISCUSSION

A. *Exhaustion*

In support of his contention that the acceptance of his plea of guilty constituted a denial of due process, Matusiak has argued that "[a] higher standard of competence is required for entering a guilty plea than for standing trial," and that the court must take care to determine that the defendant understands the consequences of his plea and the constitutional protection he is waiving. The State contends that because Matusiak never argued to the state courts that a higher standard of competence is required for acceptance of a guilty plea than for a determination of competence to stand trial, Matusiak has not exhausted his state court remedies. We disagree.

The requirement of 28 U.S.C. § 2254(b) that a habeas petitioner exhaust his state court remedies before seeking relief from the federal court requires that the petitioner first give the state courts "a fair opportunity to pass upon his federal claim." *Daye v. Attorney General of the State of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc); *see Picard v. Connor*, 404 U.S. 270, 275 (1971). This requires that he first present to the state courts both the

essential facts of his claim, *e.g.*, *id.* at 276, and the legal basis for the claim, *Daye v. Attorney General of the State of New York*, 696 F.2d at 191; *see Picard v. Connor*, 404 U.S. at 277-78. The requirement that the legal basis have been presented to the state court is satisfied "if the legal basis of the claim made in state court was the 'substantial equivalent' of that of the habeas claim." *Daye v. Attorney General of the State of New York*, 696 F.2d at 192.

It is plain that the claim presented by Matusiak here is the equivalent of that presented in Matusiak's brief to the Appellate Division. The principal heading in that brief cited the Fourteenth Amendment to the Constitution and argued that Matusiak had been "DENIED HIS RIGHT TO DUE PROCESS . . . WHEN THE TRIAL COURT EXTRACTED A GUILTY PLEA FROM APPELLANT, WHOSE PRIOR AND EXTENSIVE PSYCHIATRIC HISTORY, AS WELL AS HIS BEWILDERED AND ERRATIC BEHAVIOUR AT THE PLEA, SIGNALLED THAT APPELLANT WAS TOTALLY INCAPABLE OF WAIVING HIS RIGHT TO TRIAL . . . ." The body of the brief on that point, citing, *inter alia*, *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir.), *cert. denied*, 439 U.S. 915 (1978), argued, *inter alia*, that a plea of guilty cannot be accepted consistently with due process unless the defendant knowingly waives his constitutional rights to trial by jury and to confrontation of his accusers, and his privilege against self-incrimination. Citing *Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam), the brief argued that the court that accepted Matusiak's plea had not taken the precautions warranted by the circumstances to assure that the plea was knowing and voluntary.

These are the same substantive arguments made here and in the district court. Matusiak thus presented to the Appellate Division all of the doctrinal elements of his present claim. Whether or not the authorities relied on effectively impose a higher standard of competency for a guilty plea than for standing trial is not material to the issue of exhaustion. Principles of exhaustion did not require Matusiak to set forth an explicit comparison of the doctrines underlying his two claims.

Finally, we note that to the extent that it might have been helpful for the court to have the comparative view presented, that view was discussed in at least two of the cases relied on in Matusiak's brief. Thus, in *Suggs v. LaVallee*, this Court noted that

> [i]t has been held that competency to plead guilty must be greater than competency to stand trial since the former requires an understanding of constitutional rights. . . . This conclusion was based on the holding in *Westbrook v. Arizona*, [*supra*], which recognized a distinction between competence to stand trial and competence to waive the right to counsel, the former nor [*sic*] necessarily guaranteeing the latter.

570 F.2d at 1118 n.65 (citations omitted). Both *Suggs* and *Westbrook* were cited by Matusiak to the Appellate Division. We conclude that Matusiak satisfied the exhaustion requirement.

B. *The Merits*

Analysis of the merits of Matusiak's claim that he is entitled to habeas relief because he lacked the capacity to knowingly and voluntarily enter a plea of guilty requires

both an evaluation of the record as to Matusiak's state of mind at the time the plea was entered and an assessment of what deference the federal court must give to the state court's implicit determination that it was proper to accept the plea. Our analysis persuades us that the writ should have been granted.

We begin by recognizing, as did the district court, that under 28 U.S.C. § 2254(d) a federal habeas court is required to give deference to findings of fact made by the state court after a full and fair hearing at which the material facts were adequately developed, unless the federal court concludes that the record as a whole does not fairly support the state court's factual determination. *Id.* §§ 2254(d)(3) and (8). This requirement applies, however, only to matters of "historical" fact and to factual inferences to be drawn from the historical facts; it does not apply to questions of law or to mixed questions of fact and law. *See, e.g., Marshall v. Lonberger,* 459 U.S. 422, 431-32 (1983); *Sumner v. Mata,* 455 U.S. 591, 597 (1982); *United States v. Curcio,* 694 F.2d 14, 21 (2d Cir. 1982).

The question of whether or not a plea of guilty has been entered voluntarily within the meaning of the Constitution is a complex one that involves questions of law and questions of fact. When such a plea is entered, the defendant waives several federal constitutional rights, including the right to trial by jury, the right to confront his accusers, and the privilege against compulsory self-incrimination. *See Boykin v. Alabama,* 395 U.S. at 243. For the plea to be voluntary, "[i]t is axiomatic" that the defendant must at least be competent to proceed, *United States v. Masthers,* 539 F.2d 721, 725 (D.C. Cir. 1976). In addition, he must have an awareness of the true nature of the charge against him, *e.g., Henderson v. Morgan,* 426

U.S. 637, 645 (1976); have a "rational as well as factual understanding of the proceedings against him," *Dusky v. United States*, 362 U.S. 402, 402 (1960); and have knowledge of the nature of the constitutional protections he will forgo by entering his plea, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

These components of voluntariness have been held to constitute, or at least to depend on, questions of fact the state court determinations of which are subject to the requirements of § 2254(d). In *Marshall v. Lonberger*, 459 U.S. 422, for example, the Court held that the defendant's knowledge of the charges previously brought against him was a question of fact and that the state court's determination of his knowledge was therefore entitled to deference under § 2254(d). In *Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam), the Court held that the defendant's competence to stand trial was a question of fact, the state court's determination of which was entitled to such deference. In both of these cases, the state court had heard testimony going directly to the question at issue, *see Marshall v. Lonberger* (defendant's testimony as to his knowledge of prior charges); *Maggio v. Fulford* (psychiatrist's testimony as to defendant's competence), and the Supreme Court emphasized that the state courts' determinations as to the credibility of witnesses were entitled to special respect. *Id.* at 112-18; *Marshall v. Lonberger*, 459 U.S. at 432-35.

Nonetheless, the ultimate "question of an effective waiver of a federal constitutional right in a proceeding is . . . governed by federal standards," *Boykin v. Alabama*, 395 U.S. at 243, and "the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law . . . and

not a question of fact subject to the requirements of 28 U.S.C. § 2254(d)." *Marshall v. Lonberger*, 459 U.S. at 431 (citing *Henderson v. Morgan*; *Boykin v. Alabama*); *cf. Miller v. Fenton*, 106 S. Ct. 445 (1985) (voluntariness of a confession is a legal question meriting independent consideration in a federal habeas proceeding). The standard set by *Boykin v. Alabama* with respect to the voluntariness of a plea of guilty for federal constitutional purposes requires not only that the plea court inquire into the defendant's understanding of the charges, the proceedings, and the rights to be forgone, but also that it do so showing "the utmost solicitude of which [the court is] capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 243-44. The court should not accept such a plea "without an affirmative showing that it was intelligent and voluntary." *Id.* at 242.

The record in the present case persuades us that the state court's implicit factual determinations that Matusiak was competent to enter a guilty plea and that he knowingly and intelligently did so are not entitled to deference, and that Matusiak's waiver of his right to go to trial was not effective under federal constitutional standards. As noted above, the federal habeas court is not required to defer to a state court factual determination if "the material facts were not adequately developed at the State court hearing . . . ," 28 U.S.C. § 2254(d)(3), or if the record as a whole does not fairly support that determination, *id.* § 2254(d)(8). We find lacking here fair support in the record for the state court's implicit finding that Matusiak's election to forgo trial was intelligent, and we find that there was inadequate development of the

material facts at the plea hearing as to Matusiak's competence to enter a plea.

As to the state of Matusiak's knowledge, there is little to suggest that Matusiak understood the nature of the trial to which he was entitled. In the plea hearing, the court informed Matusiak that it was up to the jury to decide whether to believe his defense of insanity; the court did not tell Matusiak that if the jury believed that defense Matusiak would be found not guilty of the crime with which he was charged. Shortly thereafter, when Matusiak told the court that he did not know what he was doing when he killed Mascia, the court stated that he could let the jury decide whether he knew what he was doing, and that "maybe a jury will believe what you will tell them. I don't believe you . . . ." The fact that the court had a negative view of Matusiak's claim of innocence would not, of course, have been determinative if Matusiak went to trial. But this may well not have been apparent to Matusiak. Though the court's statement of its (irrelevant) view might well have been harmless if the defendant were one who understood the nature of a criminal trial, it is far from clear that Matusiak was such a person, and, indeed, the record suggests the contrary. Matusiak had testified at his November 1979 competency hearing that he had never been in a trial and did not "know about court things too much." At that time, Matusiak had described his understanding of the roles of the jury and the court: He did not know what the jury did, but he thought the judge "judges . . . . [t]he defendant. . . . [t]o see if [he is] guilty or not guilty."

Given this prior perception of the role of the judge, Matusiak may well have concluded at the plea hearing that it would be pointless to have a jury believe he was

insane since this judge believed him guilty. The court did nothing at the plea hearing to dispel Matusiak's earlier articulated conception that the ultimate question of his guilt would be determined by the judge, and indeed it may have reinforced that misimpression in Matusiak's mind by stating its own disbelief in Matusiak's position. In these circumstances, we find it difficult to conclude that Matusiak's entry of his plea was intelligent and knowing or that the court's implicit finding that Matusiak understood the nature of the right he would forgo is fairly supported by the record as a whole.

Moreover, the court did virtually nothing in the plea hearing to develop the material facts as to Matusiak's current competence to enter a plea, though the prior record was ample to suggest that capacity might be lacking. Matusiak had been institutionalized at least five times before his arrest. The court had twice thereafter ordered psychiatric examinations for him, a matter of months apart. The latter examination had resulted in two of the three psychiatrists who examined him concluding that he was not competent to proceed. Though the court's subsequent hearing had led it to the conclusion that Matusiak was in fact competent to proceed, that determination had been made nearly a year before the hearing that led to the entry of his plea. We think it hardly demonstrated the "utmost solicitude" for the plea court to have assumed, without any further inquiry, that the year-old determination of competence, especially for a defendant whose instability had necessitated successive psychiatric evaluations a few months apart, remained valid.

Certainly there was nothing in Matusiak's responses to the court's questioning at the hearing to reassure the

court that Matusiak was then capable of exercising rational judgment. He began by telling the court that he was "positive" that he wanted to plead guilty. Then, in quick succession, he stated that he wanted to go to trial and did not want to plead guilty, and that he did not want to go to trial but did want to plead guilty. When asked to describe what had happened in the killing of Mascia, Matusiak gave responses that suggested an unstable mental state. For example, though he eventually gave affirmative answers to the court's probing as to whether he and he alone had smothered Mascia, *en route* Matusiak stated that he did not know how Mascia died; that he did not know who had put the pillow over Mascia's face; that he did not know why he had put the pillow over Mascia's face; that Dyser both was and was not with him when he smothered Mascia; and that he did not know whether Dyser had helped him hold the pillow over Mascia's face. While mere recalcitrance would not suffice to call into question the rationality of a defendant who had no history of mental illness, where, as here, there is such extreme equivocation by a defendant who has an extensive history of psychiatric problems, the court could not, consistent with due process, accept the plea of guilty without a more searching inquiry or a more up-to-date psychiatric evaluation.

Given the totality of the state court record, we conclude that the material facts as to Matusiak's competence to proceed were not adequately developed at the plea hearing. The court neither sought out nor received the necessary affirmative showing that Matusiak was capable of knowingly and voluntarily entering a plea of guilty.

Nor are we required to accept the findings of the district court that Matusiak's plea was made voluntarily

and knowingly since these findings were not made within the proper legal framework. The district court relied solely on our pre-*Boykin* decision in *United States ex rel. Bullock v. Warden*, 408 F.2d 1326, in concluding that the state court was not required to conduct a more extensive inquiry than it did, notwithstanding Matusiak's "expression of confusion when called upon to plead." The court did not mention *Boykin v. Alabama* or otherwise appear to give any recognition to *Boykin*'s requirement that the court that accepts a plea do its utmost to ensure that the defendant fully understand the import and consequences of his plea. To the extent that the district court may have meant to find that the state court did make the required inquiry, we conclude, on the basis of our review of the record as discussed above, that such a finding would have been clearly erroneous.

Accordingly, we reverse the judgment dismissing Matusiak's petition and remand for entry of an order conditionally granting the writ. The judgment should state that the writ will be granted unless within 30 days the State holds a hearing to determine Matusiak's present mental competence to stand trial or to enter a plea of guilty. If it is determined as a result of that hearing that Matusiak is competent, the State is, of course, free to try him or to accept a proper plea. If it is determined that Matusiak is not competent, the State's mental health authorities may take whatever steps are appropriate under the pertinent provisions of state law.

CONCLUSION

The judgment of the district court is reversed, and the matter is remanded for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-85-0008

CHESTER MATUSIAK

Petitioner,

—against—

WALTER KELLY, Superintendent of Attica Correctional Facility, *et alia,*

Respondents.

MEMORANDUM AND ORDER

SIFTON, District Judge.

Petitioner, Charles Matusiak, *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition raises two issues: whether the trial court erred in finding petitioner competent to proceed and whether petitioner's guilty plea was accepted in violation of his due process rights.

On October 6, 1980, petitioner pleaded guilty to one count of murder in the second degree before the Hon. William C. Thompson, Justice of the Supreme Court of the State of New York, County of Kings. Indictment No. 2289/79 charged petitioner with three counts of murder in the second degree, N.Y. Penal Law §§ 125.25(1), (3) and (3); robbery in the first degree, N.Y. Penal Law § 160.15(1), and burglary in the first degree, N.Y. Penal Law § 140.30(2). Petitioner and his co-defendant, Richard Dyser, allegedly climbed up a fire escape, entering an apartment through the kitchen window on the evening of June 12 or the morning of June 13, 1979. Petitioner then allegedly suffocated the apartment's 60-year-old occupant

by holding a pillow over his face and stole food and clothing from the apartment.

Upon petitioner's motion, he was examined pursuant to N.Y. Crim. Procedure Law Article 730 and, after a hearing held before the Hon. Philip Lagana, New York Supreme Court, Kings County, on November 21, 1979, was determined to be competent to stand trial.[1]

Petitioner thereafter pleaded guilty, in return for a promised sentence of fifteen years to life imprisonment, which he received on November 7, 1980.

Petitioner appealed the judgment to the Appellate Division, Second Department, raising two grounds. Petitioner alleged that he was denied due process when the hearing court found him fit to proceed. Petitioner also alleged that the trial court improperly accepted his guilty plea since he was mentally incapable of waiving his right to trial.

The judgment was unanimously affirmed without opinion by the Appellate Division on December 27, 1983, *People v. Matusiak*, 98 A.D.2d 997 (2d Dep't 1983). The Hon. Lawrence H. Cooke denied petitioner's subsequent application for leave to appeal to the New York Court of Appeals on February 29, 1984. *People v. Matusiak*, 61 N.Y.2d 910 (1984).

Section 2254(d) of Title 28 of the United States Code provides:

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

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1 Petitioner was represented by the Legal Aid Society.

"(1) that the merits of the factual dispute were not resolved in the state court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the

> provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

As regards petitioner's fitness to stand trial, he was granted a full and fair hearing before Justice Lagana and was represented by counsel at that time. The material facts were adequately developed by Justice Lagana, who obtained reports from three examining psychiatrists as required by Criminal Procedure Law 730.10(7) and 730.20(1), (5). Justice Lagana also took testimony from two of the psychiatrists, petitioner, and petitioner's attorney. Justice Lagana then made a decision based on the merits of the factual issue of petitioner's sanity and fitness to stand trial. Therefore, conditions (1) through (7) enumerated in 28 U.S.C. § 2254(d) are not implicated and do not act to invalidate the presumption of correctness this Court must accord to the prior state decision. The remaining issue is whether the state court's decision was amply supported by the record. The burden rests upon the petitioner to establish by convincing evidence that the state court's determination was erroneous. *Sumner v. Mata*, 449 U.S. 539, 551 (1981). A review of the hearing transcript and supporting psychiatric reports leads this Court to conclude that petitioner has not met that burden.

Criminal Procedure Law § 730.10(1) defines an "incapacitated person" as "a defendant who as a result of mental disease or defect lacks the capacity to understand the proceedings against him or to assist in his own defense." The proof before the state court sufficiently supported that court's conclusion that petitioner was competent to stand trial. One psychiatrist, Dr. Finch, found that petitioner was "fit to proceed." She described petitioner as being "able to understand his charge." Further, Dr. Finch's report stated that "defendant's statements were never spontaneous, but always relevant, coherent and goal oriented."

Dr. Weidenbacher and Dr. Goldman concluded that petitioner was incapacitated. Dr. Weidenbacher's finding, however, was largely based upon his belief that the anxiety caused by trial might lead petitioner to attempt suicide, which petitioner had attempted several times in the past. Dr. Weidenbacher, like Dr. Finch, made the following observation of petitioner:

> "He presents at interview this morning as a young man of quietly anxious appearance and manner. There is a wary, gaged [sic] quality about a number of his responses. He is alert and attentive, and, although his responses are often delayed, they are all relevant and coherent."

Further, Dr. Weidenbacher noted that petitioner "does not at present intend to harm himself." Moreover, "he understands the nature of the charges against him, and ostensibly he wishes to return to court."

The third psychiatrist, Dr. Goldman, stated that petitioner "is correctly oriented to time and place." Further, Dr. Goldman noted that he understands the role of his lawyer, the District Attorney, the judge, and the jury. Petitioner also evidenced his ability to read, write, do simple additions and multiplications, and answer basic questions of common knowledge concerning the length of a calendar year and the names of prominent political figures. Dr. Goldman, like Dr. Weidenbacher, was almost entirely concerned with petitioner's suicidal tendencies and the "good risk that he will attempt to kill himself when he becomes convinced that the deceased is indeed dead."

While there can be no doubt that the reports of all three psychiatrists indicate that petitioner has a long history of drug abuse and mental problems, including suicidal tendencies, the reports also substantiate the state court's conclusion that petitioner was fit to stand trial. The testimony of Dr. Weidenbacher and Dr. Goldman at the hearing further supports the state court's competency determination. Both doctors, though concluding that petitioner was not incompetent to proceed because of his anxiety and unstable personality, repeatedly concede that he was "oriented," "coherent," and "responsive."

Within the state court's discretion, Justice Lagana apparently concluded that petitioner's evident ability to provide relevant answers to questions outweighed any potential risk of suicide. Furthermore, petitioner himself repeatedly stated that he would not attempt suicide. These statements could be given evidentiary weight by Justice Lagana, given petitioner's conceded generally "oriented" and "coherent" behavior.

In *Dusky v. United States*, 362 U.S. 402 (1960), the United States Supreme Court established the standard for determining a defendant's competency to stand trial in federal court:

> "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

The Fifth Circuit Court of Appeals in *Bolius v. Wainwright*, 597 F.2d 986, 988 n.3 (5th Cir. 1979), stated that "in the context of a § 2254 habeas challenge to a plea entered in state court, we have no doubt that the same standard applies." Under this standard, Justice Lagana's determination is not constitutionally infirm and must be presumed to be correct. Having read the hearing transcript, this Court finds, upon the totality of the evidence, that the hearing judge's factual determination was amply supported. *See United States ex rel. Franco v. Ternullo*, 413 F. Supp. 801, 803 (S.D.N.Y. 1976) (Weinfeld, J.). Justice Lagana had to resolve conflicts in the evidence, and that evidence presented in support of a determination of competency was "weighy enough to sustain the judge's assessment of the scales." *Bolius v. Wainwright*, *supra*, 597 F.2d at 985. The petitioner had a full and fair hearing in the state court on the issue of his competency, and, therefore, there is no need for another evidentiary hearing in this Court. 28 U.S.C. § 2254(d); *Ternullo*, *supra*, 513 F. Supp. at 803.

Petitioner also claims that his guilty plea was improperly obtained in violation of his due process rights. As stated in *Henderson v. Morgan*, 426 U.S. 637, 645 n.13 (1979),

> "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, *e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464-65, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt."

The record in this case discloses that petitioner knowingly and voluntarily entered his plea of guilty. At the beginning of the plea, petitioner's attorney, Mr. Moser, stated that he has spoken with petitioner during the previous week and immediately prior to the plea and that petitioner had decided to withdraw his previously entered plea of not guilty and enter a plea of guilty. Mr. Moser noted that he had fully explained to petitioner that a defense of insanity was available. Nevertheless, after being duly advised of the significance of entering a plea of guilty to the second degree murder charge, petitioner still wanted to change his plea. Following Mr. Moser's statement, petitioner himself told the court that he wanted to plead guilty. He reiterated his desire several times, once indicating that he was "positive" he wanted to plead guilty. When the court told petitioner that, by pleading guilty, he was waiving an insanity defense, petitioner then stated that he wanted to go to trial. The court responded, "Okay you'll go to trial, no problem." Petitioner conferred with Mr. Moser and then stated, "Your Honor, I don't want to go to trial. I want to plead guilty now." Upon further detailed questioning by the court, petitioner repeatedly expressed his desire to plead guilty and his realization that he was waiving an insanity defense. Only when defendant acknowledged that he was waiving the insanity defense did the court pursue questioning regarding petitioner's waiver of a jury trial, of his right to present witnesses, and his right to cross-examine the government's witnesses. Petitioner then knowingly and intelligently[2] agreed

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2 Petitioner waived the rights with a seemingly complete understanding of the significance of doing so and in return for the minimum sentence that could be imposed for a second-degree murder conviction.

to waive these rights. The court then began to elicit from petitioner the factual admissions necessary to support his plea. At first, petitioner responded that he didn't know how the deceased had died. Then, petitioner conceded that he had killed the deceased, but did not know what he was doing. After repeated conferences with Mr. Moser, petitioner gradually spilled out the entire story of what occurred. It must be emphasized that petitioner made each admission upon conferring with counsel. Although petitioner's plea was certainly not a model of clarity or consistency, the record does indicate that it was made voluntarily and knowingly. Nor was the conduct of the court coercive. The court took sufficient care to ensure that petitioner understood what he was doing in pleading guilty.

Throughout the proceedings, the judge assured petitioner that he was free to plead as he wished. Petitioner's expression of confusion when called upon to plead should perhaps have prompted a greater inquiry by the judge as to the source of petitioner's indecision, but no such inquiry was required. *See United States ex rel. Bullock v. Warden*, 408 F.2d 1326 (2d Cir. 1969). Petitioner's answers to the judge's questions, on balance, indicate that he wished to plead guilty and understood the consequences of so doing.

Because neither ground raised in the instant petition provides a basis for federal habeas relief, the petition is denied.

The clerk is directed to enter judgment dismissing the petition and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
June 25, 1985

/s/ (illegible)
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March one thousand nine hundred and eighty-six.

Present:

HON. JAMES L. OAKES,
HON. AMALYA L. KEARSE,
LAWRENCE W. PIERCE,
Circuit Judges,

No. 85-2233

CHESTER MATUSIAK,
Plaintiff-Appellant,

—v.—

WALTER KELLY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is REVERSED and the action be and it hereby is REMANDED to the district court for further proceedings not inconsistent with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH
Clerk

/s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk